Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

CHARLES S. BARKER and EXPRESS GOLF, INC.,

Petitioners,

vs.

GOLF U.S.A., INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

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54 pp

QUESTIONS PRESENTED

I. Whether the Federal Arbitration Act preempts state choice of law and forum selection substantive rules, applicable to all contracts and in all cases, when an arbitration clause is included.

II. Whether state law overrides the federal doctrine of separability established by Prima Paint v. Flood & Conklin Mfg. in cases governed by the Federal Arbitration Act.

LIST OF PARTIES

The names of all parties to the proceedings in the Court whose judgment is sought to be reviewed here appear in the caption of the case. There are no parent or subsidiary companies of any party to be listed.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Charles S. Barker and Express Golf, Inc., respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINION BELOW

The opinion below was issued on August 20, 1998 in Charles S. Barker; Express Golf, Inc. v. Golf U.S.A., Inc., Eighth Circuit No. 97-4243, Judge Heaney dissenting, and is reproduced in the Appendix at pages 1a-17a. It is not yet reported in Federal Third. On September 29, 1998, the Eighth Circuit denied the Petition for Rehearing and Suggestion for

Rehearing En Banc, with Judge McMillian in favor of granting rehearing en banc.

STATEMENT OF JURISDICTION

The Court of Appeals entered judgment on August 20, 1998. The Petition for Rehearing and Suggestion for Rehearing En Banc was denied on September 29, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

9 U.S.C. § 2.

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

STATEMENT OF THE CASE

Charles Barker is a Missouri citizen who operated a Golf U.S.A. franchise, through Express Golf, Inc., a corporation established for that purpose,

in St. Louis County, Missouri pursuant to a franchise agreement (executed by Express Golf, Inc.) and a guaranty agreement (executed by Charles Barker) with Golf U.S.A., Inc., the franchisor. Golf U.S.A., Inc. is an Oklahoma corporation which maintains its principal office and place of business in Oklahoma City, Oklahoma.

The Golf U.S.A. franchise shop was operated in Missouri and therefore, arguably, governed by the Missouri Franchise Act, R.S. Mo. § 407.400, et seq. The Missouri Franchise Act requires 90 days' notice of termination by the franchisor, with certain exceptions that are inapplicable here. R.S. Mo. § 407.405.

The Golf U.S.A. franchise agreement contains a choice of law clause, selecting the law of Oklahoma, and a choice of forum clause, requiring the franchisee to arbitrate its claims against Golf U.S.A., Inc. in Oklahoma. Appendix, p. 2a, 3a. The arbitration clause, however, excludes claims by Golf U.S.A. against Charles Barker and Express Golf, Inc. for "monies owed to Golf U.S.A." Appendix, p. 2a. The franchise agreement also permits Golf U.S.A. to convert all its claims to "monies owed" it by permitting it to terminate the franchise agreement upon 24 hours' notice of any default that "materially impairs the goodwill associated with the Golf U.S.A. name, service mark or logo." Appendix, p. 14a, n. 5.

The franchise agreement requires the franchisee, Express Golf, Inc., and its guarantor, Charles S. Barker, to arbitrate all their claims against Golf U.S.A. in Oklahoma while permitting

Golf U.S.A. to litigate its related claims against them in Missouri.

Prior to the Eighth Circuit opinion below, the 90-day notice of termination provision in the Missouri Franchise Act was held to be fundamental public policy in Missouri, by both the Missouri Supreme Court and the Eighth Circuit, rendering void and unenforceable conflicting choice of law and forum selection clauses for franchise shops operated in Missouri by Missouri citizens. Electrical and Magneto Service Co. v. AMBAC International Corp., 941 F.2d 660, 663-64 (8th Cir. 1991); High Life Sales Co. v. Brown-Forman Corp., 823 S.W.2d 493, 498 (Mo. banc 1992).

On September 18, 1995, Charles Barker and Express Golf, Inc. filed suit against Golf U.S.A., Inc. in the Circuit Court of St. Louis, Missouri, alleging they were fraudulently induced into the franchise and guaranty agreements by false representations and the intentional concealment of material facts relating to the financial success of existing Golf U.S.A. stores, the marketability of Golf U.S.A.'s products, the ability to share advertising expenses with existing nearby Golf U.S.A. stores, the amount of gross sales franchisees obtain, the amount of inventory required to meet the sales levels represented and the level and quality of the assistance Golf U.S.A. provides to its franchisees.

Golf U.S.A. immediately removed the case to the United States District Court for Eastern Missouri, because of diversity of citizenship under 28 U.S.C. § 1332. Golf U.S.A. then moved the District Court to

dismiss the Complaint, arguing that Charles Barker and Express Golf, Inc. were required to arbitrate their claims against it in Oklahoma.

On November 17, 1997, the District Court dismissed the Complaint, ruling that Charles Barker and Express Golf, Inc. were required to arbitrate their claims against Golf U.S.A. in Oklahoma. Appendix, pp. 19a-29a, 30a.

Charles Barker and Express Golf, Inc. appealed to the Eighth Circuit, which affirmed the District Court in a 2-1 decision on August 20, 1998. Appendix, pp. 1a-17a.

The district courts are required to apply the choice of law rules of the state in which they sit in diversity cases. Klaxon Co. v. Stentor Elec. Co., 313 U.S. 487, 496 (1941); Whirlpool Corp. v. Ritter, 929 F.2d 1318, 1320 (8th Cir. 1991); Electrical and Magneto Service Co. v. AMBAC International Corp., 941 F.2d 660, 661 (8th Cir. 1991); Educational Employees Credit Union v. Mutual Guaranty Corp., 821 F. Supp. 1294, 1299 (E.D. Mo. 1993), affirmed on this issue, but reversed on other grounds, 50 F.3d 1432, 1437 (8th Cir. 1995); State ex rel. Geil v. Corcoran, 623 S.W.2d 555, 556-57 (Mo. App. 1981). Missouri follows the Restatement of Conflicts (Second) in contract actions, but bypasses the Restatement's formal analysis and simply requires that the choice of law provision be given effect unless to do so would violate a fundamental policy of Missouri. Id.

Oklahoma does not have a similar franchise statute requiring 90 days' notice of termination. Under Oklahoma law, the 24-hour notice of termination clause in the Golf U.S.A. franchise agreement is enforceable, even though it violates the Missouri franchise statute enacted to protect Missouri citizens-franchisees from such provisions. Electrical and Magneto Service Co. v. AMBAC International Corp., 941 F.2d 660, 663-64 (8th Cir. 1991); High Life Sales Co. v. Brown-Forman Corp., 823 S.W.2d 493, 498 (Mo. banc 1992).

The majority opinion below applied the law of Oklahoma without discussion of Missouri's choice of law rules, the Missouri Franchise Act or Missouri law previously established by the Missouri Supreme Court and interpreted by the Eighth Circuit. Appendix, p. 5a. The majority opinion below stated only that "no persuasive reason having been advanced for setting aside the choice-of-law provision upon which the parties agreed in their contract, we reject this argument and conclude that Oklahoma law applies." The majority opinion also found unpersuasive the choice of law analysis of the dissent, Appendix, pp. 5a, n. 2, 11a-14a.

The majority opinion further held that it did not wish to risk "running afoul of [the strong federal policy favoring arbitration]." Appendix, p. 8a.

On September 29, 1998, the Eighth Circuit denied the Petition for Rehearing and Suggestion of Rehearing En Banc, with Judge McMillian in favor of granting rehearing en banc. Appendix, p. 18a.

REASONS FOR GRANTING THE WRIT

I. The Petition should be granted because the judgment of the Eighth Circuit conflicts with prior decisions of this Court holding that general state law, applicable to all contracts and all cases, also applies to arbitration contracts.

Petitioners respectfully submit that the majority opinion below conflicts with relevant decisions of this Court, and alternatively, decides an important question of federal law that has not been, but should be, settled by this Court. The petition should be granted under Supreme Court Rule 10(c).

The majority opinion disregarded established Missouri choice of law rules and Missouri law governing the validity and enforceability of forum selection and choice of law clauses in franchise agreements governed by the Missouri Franchise Act, applicable to all franchise agreements, not just franchise agreements containing arbitration clauses.

The 24-hour notice of termination provision in the subject franchise agreement conflicts with the Missouri Franchise Act, which requires 90 days' notice of termination, with certain exceptions that do not apply here. R.S. Mo. § 407.405. Both the Missouri Supreme Court and the Eighth Circuit have previously held that choice of law and choice of forum clauses in franchise agreements governed by the Missouri Franchise Act, applying the law of other states and requiring litigation in other states for franchise shops operated in Missouri by Missouri

citizens, are void and unenforceable as against the fundamental public policy of Missouri expressed in the Missouri Franchise Act. Electrical and Magneto Service Co. v. AMBAC International Corp., 941 F.2d 660, 663-64 (8th Cir. 1991); High Life Sales Co. v. Brown-Forman Corp., 823 S.W.2d 493, 498 (Mo. banc 1992).

Thus, under Missouri choice of law rules, which the District Court was required to apply in this diversity action, the choice of law and choice of forum clauses in the Golf U.S.A. franchise agreement are void and unenforceable in cases concerning Missouri franchise agreements which do not contain arbitration clauses.

The majority opinion disregards these established choice of law and choice of forum rules because an arbitration clause is included in the franchise agreement, stating that it does not wish to risk "running afoul of [the strong federal policy favoring arbitration]." Appendix, p. 8a.

Petitioners respectfully submit that there is no strong federal policy favoring arbitration, at least to the extent that such federal policy would override existing state law applicable to all contracts, of the same kind, generally, and all cases concerning such contracts.

The Federal Arbitration Act was not intended to be a super law which preempts substantive state law principles that apply to all contracts, of a specific kind, generally [such as franchise contracts], but instead was intended to place contracts with

arbitration clauses on the same footing as similar contracts without arbitration clauses. Volt Informational Sciences, Inc. v. Leland Stanford, Jr. University, 489 U.S. 468, 478 (1989) holds that the Federal Arbitration Act, 9 U.S.C. § 1, et seq., was merely designed to place arbitration agreements "upon the same footing as other contracts."

Other recent decisions of this Court hold that the validity and enforceability of arbitration clauses, under 9 U.S.C. § 2, are determined by general state contract law principles, within the parameters of the federal policy restrictions of the Federal Arbitration Act, so long as these state laws apply to contracts generally and are not developed specifically for arbitration contracts. Perry v. Thomas, 482 U.S. 483, 492, n. 9 (1987); Allied-Bruce Terminix Companies, Inc. v. Dobson, 513 U.S. 265, 281 (1995); First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 115 S. Ct. 1920, 1924 (1995) and Doctor's Associates, Inc. v. Casarotto, 116 S. Ct. 1562, 1565 (1996).

Missouri law provides that all choice of law and forum selection clauses in franchise agreements for franchise shops operated by Missouri citizens within the State of Missouri which deny Missouri citizens the protection of the Missouri Franchise Act, including its 90-day notice of termination provisions, are void and unenforceable as against the fundamental public policy of Missouri. This rule of Missouri law applies equally to franchise contracts with and without arbitration clauses. That is all the Federal Arbitration Act requires.

The majority opinion disregarded established Missouri choice of law rules, applicable to all franchise agreements, not just franchise agreements with arbitration clauses, because it did not wish to risk "running afoul of [the strong federal policy favoring arbitration]." Appendix, p. 8a.

Charles Barker and Express Golf, Inc. respectfully submit that the Eighth Circuit should not have disregarded established choice of law and forum selection substantive state laws just because an arbitration clause was included. Under established Missouri law, which applies under Missouri's choice of law rules, the choice of law and forum selection clauses are void and unenforceable as against state public policy.

Under Missouri law, the arbitration contract is void and unenforceable as against public policy and because it is unconscionable, since it requires Charles Barker and Express Golf, Inc. to arbitrate their claims against Golf U.S.A. in Oklahoma, but permits Golf U.S.A., Inc. to litigate its related claims against them in Missouri, Electrical and Magneto Service Co., Inc. v. AMBAC International Corp., 941 F.2d 660 (8th Cir. 1991); High Life Sales Co. v. Brown-Forman Corp., 823 S.W.2d 493 (Mo. banc 1992); Bracey v. Monsanto Co., Inc., 823 S.W.2d 946, 950 (Mo. banc 1992); Grand Bissell Towers, Inc. v. Joan Gagnon Enterprises, Inc., 657 S.W.2d 378, 379 (Mo. App. 1983); Muhlhauser v. Muhlhauser, 754 S.W.2d 2, 4-5 (Mo. App. 1988) and is void and unenforceable because it lacks mutuality and consideration; Fenberg v. Goggin, 800 S.W.2d 132, 136 (Mo. App. 1990); Martin v. Prier Brass Mfg. Co., 710 S.W.2d 466, 473 (Mo. App. 1986).

Petitioners respectfully submit that the majority opinion below conflicts with prior decisions of this Court, and that its implicit rule of decision – that the Federal Arbitration Act overrides substantive state law principles applicable to all contracts – raises a serious question about the federal policy behind the Federal Arbitration Act which requires resolution by this Court.

In Doctor's Associates, Inc. v. Erik J. Hamilton, 150 F.3d 157 (2nd Cir. 1998), the court held that the Federal Arbitration Act preempted the New Jersey Franchise Act, and decisions thereunder by the New Jersey Supreme Court which has also held that choice of law and forum selection clauses in New Jersey franchise agreements, requiring litigation in other states under the laws of other states, are void and unenforceable for New Jersey franchise shops operated by New Jersey citizens. The franchisee, Erik J. Hamilton, filed a petition for a writ of certiorari on October 9, 1998. There are some similarities between some of the issues raised there and in this petition.

II. The Petition should be granted because the judgment of the Eighth Circuit conflicts with prior decisions of this Court holding that the doctrine of separability is federal law which preempts conflicting state law in cases governed by the Federal Arbitration Act.

Petitioners respectfully submit that the majority opinion below conflicts with relevant

decisions of this Court, and alternatively, decides an important question of federal law that has not been, but should be, settled by this Court. The Petition should be granted under Supreme Court Rule 10(c).

Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 18 L. Ed. 2d 1270, 1276-77 (1967) established the doctrine of separability, as a matter of federal law, under which arbitration clauses are separated from the principal contracts in which they are embedded, for purposes of determining their validity and enforceability. Prima Paint establishes that the arbitration defense of fraud in the inducement, with respect to the entire principal contract, as opposed to specifically referable to the arbitration clause, is for determination by the arbitrator under a broad arbitration clause which is otherwise enforceable. It may not be used to determine the validity and enforceability of the arbitration clause before hearing the case in chief.

The Prima Paint court reasoned that the Federal Arbitration Act would be rendered meaningless if arbitration clauses were not treated as separate contracts for purposes of determining their validity and enforceability.

In the case below, Charles Barker and Express Golf, Inc. argued that the arbitration clause is void and unenforceable because it is unconscionable, violates public policy, lacks mutuality and lacks consideration. In particular, Petitioners argued below that the arbitration clause, treated as a separate contract, lacks mutuality and consideration, because Golf U.S.A., Inc. could convert all its claims to

"monies owed" it which are excepted from the arbitration clause, permitting it to litigate its claims against Petitioners in Missouri, while the arbitration clause requires Petitioners to arbitrate their related claims against Golf U.S.A. in Oklahoma.

Instead of determining whether the doctrine of separability applies to the arbitration contract defenses of lack of mutuality and the absence of consideration, the majority opinion relied upon an Oklahoma Supreme Court case which declined to follow Prima Paint in an intrastate case governed by the Oklahoma Uniform Arbitration Act. Appendix, pp. 7a. See Shaffer v. Jeffery, 915 P.2d 910, 915-16 (Okla. 1996). If the rule of Shaffer v. Jeffery were applied to the case below, the court would be required to determine the claims of Charles Barker and Express Golf, Inc. that they were fraudulently induced into the entire franchise and guaranty contracts, before determining whether they are required to arbitrate. The majority opinion below applied Shaffer v. Jeffery to hold that the doctrine of separability established by Prima Paint does not apply to the arbitration contract defenses of lack of mutuality and the absence of consideration, because the law of Oklahoma treats the contract as a whole, stating: "In Shaffer, the Oklahoma Supreme Court, in interpreting Oklahoma's Arbitration Act, rejected the Prima Paint separability doctrine that 'the arbitration clause is a severable part of the contract.' Id. at 916. In addition, Oklahoma has espoused the policy that '[t]he whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the others.'" Appendix, p. 7a.

The doctrine of separability, however, is based upon federal policy established by the Federal Arbitration Act which preempts any conflicting state law. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 18 L. Ed. 2d 1270, 1276-77 (1967). The majority opinion below conflicts with Prima Paint.

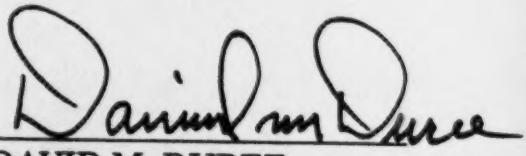
If the doctrine of separability applies to the arbitration contract defenses of lack of mutuality and the absence of consideration, the arbitration contract at issue is void and unenforceable because it imposes no obligations upon Golf U.S.A., Inc. and grants no benefits to Charles Barker and Express Golf, Inc.

On the other hand, if the federal doctrine of separability applies to some arbitration contract defenses, and not others, the majority opinion below raises an important question of federal law that has not been, but should be, settled by this Court, i.e., under what circumstances, and to which arbitration defenses, does the federal doctrine of separability apply?

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 97-4243

Charles S. Barker; Express Golf, Inc., *
*
Appellants, *
*
v. *
*
Golf U.S.A., Inc., *
*
Appellee. *

Appeal from the United States
District Court for the
Eastern District of Missouri

Submitted: May 13, 1998
Filed: August 20, 1998

Before BOWMAN, Chief Judge, HEANEY, and HANSEN, Circuit Judges.

BOWMAN, Chief Judge.

Express Golf, Inc., a franchisee, and Charles Barker, its owner, sued Golf U.S.A., Inc., the franchisor, for fraud in state court. The case was removed to federal district court on diversity grounds, whereupon Golf U.S.A. moved to dismiss on the ground that an arbitration clause in the franchise agreement required arbitration of the plaintiffs' claims. The District Court[1] granted the motion, and Express and Barker appeal.

The facts of the case are as follows. In a franchise agreement dated September 18, 1995, Golf U.S.A., an Oklahoma corporation, granted to Express, a Missouri corporation, the right to operate a golf retail store using Golf U.S.A 's methods, name, designs, system, and service marks. That same day, Charles Barker, the sole shareholder of Express, agreed to guarantee the obligations of Express under the franchise agreement. The franchise agreement included the following provision:

> Any and all disputes, claims, and controversies arising out of or relating to this Agreement, performance hereunder or breach hereof, except for monies owed to Golf USA pursuant to this Agreement and except as described in Paragraph 18.5, shall be resolved by arbitration conducted in Oklahoma County, State of

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[1] The Honorable Charles A. Shaw, United States District Judge for the Eastern District of Missouri.

> Oklahoma, in accordance with the latest existing Commercial Rules of Arbitration of the American Arbitration Association.

Franchise Agreement para. 18.1, at 29-30. A choice-of-law provision was included, which specified that the franchise agreement "shall be governed by and construed in accordance with the laws of the State of Oklahoma." Id. para. 20.1, at 31. The agreement also contained a provision in 12-point bold-face type that stated, "You acknowledge that You have received a blank copy of this Agreement in time to afford ample opportunity to seek legal counsel, and to analyze the various provisions herein." Id. para. 20.13, at 33.

The retail operation failed less than nine months after the execution of the franchise agreement. Soon thereafter, Express and Barker filed the present action, claiming that fraudulent representations made by Golf U.S.A. about the operation and success of the franchise induced Barker into signing the franchise agreement. Upon removal to federal court, the District Court held that the parties' dispute must be resolved by arbitration pursuant to the arbitration clause contained in the franchise agreement. We affirm.

Our analysis must begin by determining whether the franchise agreement is subject to the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16 (1994). In an attempt to declare a national policy favoring arbitration, Congress passed the FAA mandating the enforcement of arbitration agreements. See 9 U.S.C. § 2. The Supreme Court has held that the FAA applies to arbitration

provisions, thereby mandating their enforcement, subject to only two limitations. See Southland Corp. v. Keating, 465 U.S. 1, 10-11 (1984). First, the arbitration agreement "must be part of a written maritime contract or a contract 'evidencing a transaction involving commerce.'" Id. at 11 (quoting 9 U.S.C. § 2). Second, the agreement "may be revoked upon 'grounds as exist at law or in equity for the revocation of any contract.'" Id. (quoting 9 U.S.C. § 2). The District Court found, and the parties do not dispute, that the franchise agreement involves interstate commerce. The parties are located in different states, Oklahoma and Missouri, and the agreement contemplates the transfer of inventory and money between the states. The parties do dispute, however, whether the arbitration clause contained in the franchise agreement is valid.

Initially, we must determine whether it is for the court or an arbitrator to decide the validity of the arbitration clause. Express and Barker claim that the arbitration clause lacks mutuality of obligation, is unconscionable, and violates public policy. The District Court held that these claims should be decided by an arbitrator. We disagree. In Prima Paint Corp. v. Flood & Conklin Manufacturing Co., 388 U.S. 395, 403-04 (1967), the Supreme Court held that a claim of fraud in the inducement of a contract as a whole must go to an arbitrator, but "issue[s] which [go] to the 'making' of the agreement to arbitrate" should be decided by a court. See also Houlihan v. Offerman & Co., 31 F.3d 692, 694-95 (8th Cir. 1994). In this case, the underlying claim is for fraud in the inducement of the entire contract, but that is not the issue with which we are faced today.

Rather, Express and Barker assert claims that go to the making of the arbitration agreement itself. Under Prima Paint, a court must decide whether the agreement to arbitrate is valid.

To decide whether the parties' agreement to arbitrate is valid, we look to state contract law. See Perry v. Thomas, 482 U.S. 483, 493-94, n. 9 (1987) ("[S]tate law, whether of legislative or judicial origin, is applicable if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally."). We may apply state law to arbitration agreements only to the extent that it applies to contracts in general. See Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 281 (1995). Put another way, we may not invalidate an arbitration agreement under any state law applicable only to arbitration provisions; instead, we may apply only a state's general contract defenses. See Doctor's Assocs. v. Casarotto, 517 U.S. 681, 687 (1996).

The question then becomes one of choice-of-law. Which state's laws are we to apply? Despite a choice-of-law provision in the franchise agreement designating Oklahoma law, Express and Barker argue that Missouri law should apply. No persuasive reason having been advanced for setting aside the choice-of-law provision upon which the parties agreed in their contract, we reject this argument and conclude that Oklahoma law applies.[2]

---

[2] We find unpersuasive the reasons articulated in the dissenting opinion for declaring the choice-of-law provision invalid.

Express and Barker claim that Golf U.S.A.'s promise to arbitrate is illusory and therefore fails for lack of mutuality. They argue that virtually any claim can be converted into a claim for monies owed to Golf U.S.A. pursuant to the agreement and, as a result, Golf U.S.A. is permitted to litigate any conceivable claim, while they must arbitrate their claims. To resolve this issue, "we are bound to apply [Oklahoma law] as we are able to discern it from the rulings of [Oklahoma's] courts." Jackson v. Anchor Packing Co., 994 F.2d 1295, 1310 (8th Cir. 1993). The Oklahoma courts have not ruled on the issue of whether mutuality of obligation is required in an arbitration clause. For the reasons stated below, we believe that the Oklahoma Supreme Court would hold that mutuality in arbitration clauses is not required.

In Ditto v. Re/Max Preferred Properties, Inc., 861 P.2d 1000, 1004 (Okla. Ct. App. 1993), the court of appeals held unenforceable an arbitration clause that excluded one party from participating in the selection of an arbitrator. In the process, the court considered an argument that the arbitration clause lacked mutuality of obligation. See Ditto, 861 P.2d at 1002. The court cited two cases in distinguishing its case from those that "involve truly one-sided obligations to arbitrate." Id. (citing R.W. Roberts Constr. Co. v. St. Johns River Water Management Dist., 423 So.2d 630, 632 (Fla. Ct. App. 1982) and Arcata Graphics Corp. v. Silin, 399 N.Y.S.2d 738, 738-39 (1977)). The court's consideration of the issue, however, is pure dicta. Id. ("We reject [the lack of mutuality argument] as a proper ground to challenge the clause at issue [because] . . . [t]he trial court expressly rested its decision on the unfairness of the

arbitration panel."). Further, the decision in Arcata Graphics to which the court cited has since been abrogated by Sablosky v. Gordon Co., 73 N.Y.2d 133, 136-37 (1989), wherein the New York Court of Appeals expressly held that mutuality is not required in arbitration provisions if there exists consideration for the entire agreement. Thus, we do not read Ditto to indicate that the Oklahoma courts would require mutuality of obligation in arbitration clauses where the entire agreement is supported by consideration.

We are further persuaded that the Oklahoma Supreme Court would not separately require mutuality in arbitration clauses based on the more recent decision of Shaffer v. Jeffery, 915 P.2d 910 (Okla. 1996). In Shaffer, the Oklahoma Supreme Court, in interpreting Oklahoma's arbitration act, rejected the Prima Paint separability doctrine that "the arbitration clause is a severable part of the contract." Id. at 916. In addition, Oklahoma has espoused the policy that "'[t]he whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the others.'" Pierce Couch Hendrickson Baysinger & Green v. Freede, 936 P.2d 906, 911 (Okla. 1997) (quoting Okla. Stat. Ann. tit. 15, § 157 (West 1993)).

Moreover, we find no indication that the Oklahoma Supreme Court would not join the trend established by decisions holding that consideration for a contract as a whole covers the arbitration clause. See Doctor's Assocs. v. Distajo, 66 F.3d 438, 452 (2d Cir. 1995) ("Most courts facing this issue have arrived at the same conclusion [that consideration for the

entire contract is sufficient to support the arbitration clause].") (citing cases), cert. denied, 517 U.S. 1120 (1996); see also Restatement (Second) of Contracts § 79 (1979) ("If the requirement of consideration is met, there is no additional requirement of . . . 'mutuality of obligation.'"). Finally, "[a] doctrine that required separate consideration for arbitration clauses might risk running afoul of [the strong federal policy favoring arbitration]." Doctor's Assocs., 66 F.3d at 453. For all these reasons, we conclude that, under Oklahoma law, mutuality of obligation is not required for arbitration clauses so long as the contract as a whole is supported by consideration.[3] In this case, the

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[3] The dissenting opinion relies on an unpublished opinion by the Oklahoma Court of Appeals in concluding that Oklahoma law requires mutuality of obligation in arbitration agreements and that this clause is thus violative. See Neighbors v. Lynn Hickey Dodge, Inc., No. 85676 (Okla. Ct. App. Aug. 6, 1996) (withdrawn from publication). Neighbors, however, should not be relied upon. After the court of appeals in Neighbors rendered its decision and released the opinion for publication, one of the parties petitioned to the Oklahoma Supreme Court for certiorari. On November 12, 1996, the Oklahoma Supreme Court denied certiorari and issued an order mandating that the opinion be withdrawn from publication. See Order Nov. 12, 1996. This overt act by the Oklahoma Supreme Court commands our restraint from relying on or citing to the opinion because we do not know the reason for the withdrawal. Of course, one possibility is that the supreme court did not agree with the result. We find it unlikely, as the dissenting opinion suggests, that the opinion may have been withdrawn because it applies settled law. Our discussion in the text of the opinion illustrates that the issue is far from settled in the Oklahoma courts. The Neighbors opinion lacks precedential value, see 8th Cir. R. 28A(k); Okla. Sup. Ct. R. 1.200(b)(5) (unpublished opinions "shall not be considered as precedent by any court or cited in any brief or other material presented to any court."), and, in these circumstances, also lacks persuasive value.

parties do not contend that the franchise agreement lacks consideration.

We also reject Express and Barker's argument that the arbitration clause is unconscionable, void, and unenforceable. We dismiss the notion that, because the contract is standardized, the arbitration provision should be void. Unconscionability generally requires a showing that one party lacked a meaningful choice as to the inclusion of the challenged provision and that the challenged provision unreasonably favors the other party. See Coblentz v. Oklahoma Farm Bureau Mut. Ins. Co., 915 P.2d 938, 940 (Okla. Ct. App. 1995). No such showing has been made in this case. We similarly find that the clause does not violate public policy. See Freeman v. Prudential Sec., Inc., 856 P.2d 592, 594 (Okla. Ct. App. 1993) ("Ordinarily, agreements of parties to bind themselves to mandatory arbitration are favored.").

We also reject Express and Barker's final argument that Golf U.S.A. waived its right to arbitrate by filing with the District Court a claim for attorney fees after the District Court's dismissal. "[A]s a matter of federal law, any doubts concerning the scope of arbitrable issues [such as an allegation of waiver] should be resolved in favor of arbitration . . . ." Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983). We will find that a party waived its right to arbitrate where that party "(1) knew of an existing right to arbitration; (2) acted inconsistently with that right; and (3) prejudiced the other party by these inconsistent acts." Ritzel Communications, Inc. v. Mid-American Cellular Tel.

Co., 989 F.2d 966, 969 (8th Cir. 1993) (citing Stifel, Nicolaus & Co. v. Freeman, 924 F.2d 157, 158 (8th Cir. 1991)). In Ritzel, the district court denied several defendants' motion for arbitration, and they appealed. While the appeal was pending, those defendants continued to litigate the merits of the case in district court. They filed answers, responded to interrogatories and requests for production, participated in depositions and pre-trial conferences, and filed numerous motions and documents in preparation for trial. The case was eventually tried in a six-day bench trial and judgment entered against the defendants. We held that the defendants had waived their right to arbitration "[b]y failing to make the simple effort of requesting a stay in this court and by proceeding to trial on the merits in the district court." Id. at 970 (emphasis added). In this case, Golf U.S.A. has not acted inconsistently with its right to arbitration because Golf U.S.A. has not attempted to litigate the merits of the case. To the contrary, it has resisted litigation and has persuaded the District Court to dismiss the plaintiffs' lawsuit in favor of arbitration. Furthermore, Express and Barker have not shown any prejudice to themselves. Even if the District Court grants Golf U.S.A.'s pending motion for attorney fees, that is not prejudice to Express and Barker for purposes of the rules applicable in determining whether a waiver of a right to arbitration has occurred.

In conclusion, we believe that the arbitration provision is valid upon "grounds as exist at law," 9 U.S.C. § 2, and therefore hold that the FAA mandates the enforcement of the arbitration clause. We affirm

the judgment of the District Court dismissing the complaint.

HEANEY, Circuit Judge, dissenting.

I respectfully dissent. As a preliminary matter, I believe that Missouri law, rather than Oklahoma law, applies. "Federal district courts must apply the choice of law rules of the state in which they sit when jurisdiction is based on diversity of citizenship." Whirlpool Corp. v. Ritter, 929 F.2d 1318, 1320 (8th Cir. 1991) (citing Klaxon Co. v. Stentor Elec. Co., 313 U.S. 487, 496 (1941)). We review de novo the district court's determination of which state's law to apply. See Salve Regina College v. Russell, 499 U.S. 225, 230 (1991).

Express filed this case in the Eastern District of Missouri. Therefore, we apply Missouri's choice of law rules. Missouri courts follow the Restatement (Second) of Conflicts when analyzing contractual agreements.[4] See Fruin-Colnon Corp. v. Missouri

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[4] Section 187 of the Restatement provides:

> (1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.
>
> (2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit

Highway & Transp. Comm'n, 736 S.W.2d 41, 44 (Mo. 1987). Because Missouri has greater contacts, its law would govern the case absent a valid choice of law by the parties. See Restatement (Second) Conflicts § 187(1)(b). Having carefully reviewed the record, I also find that Missouri has a materially greater interest in the effect of the forum-selection clause than Oklahoma. Id. Finally, to determine whether the choice of law provision is valid, we must ask whether the arbitration clause at issue violates a fundamental policy of Missouri. Id. I conclude that it does.

In Electrical & Magneto Service Co. v. Ambac International Corp., 941 F.2d 660 (8th Cir. 1991), our court reviewed Missouri statutes concerning franchise agreements and concluded that "the Missouri Legislature created a legislative presumption that franchisees are in an inferior bargaining position with respect to franchisors and thus are entitled to

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> provision in their agreement directed to the issue, unless . . .
>
> . . .
>
> (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which . . . would be the state of the applicable law in the absence of an effective choice of law by the parties.

Restatement (Second) Conflicts § 187 (1988).

protection from the oppressive use of the franchisor's superiority." Id. at 663 n. 3. Although the majority is correct that "we may not invalidate an arbitration agreement under any state law applicable only to arbitration provisions[,]" ante at 4, I would invalidate this arbitration agreement, because rather than single out specific protections afforded only to arbitration agreements under Missouri law, the Missouri legislative scheme at issue "is designed to regulate the marketplace to the advantage of those traditionally thought to have unequal bargaining power as well as those who may fall victim to unfair business practices." Id. at 663. In my judgment, the arbitration provision that allows Golf U.S.A. to sue in court, but requires Express to arbitrate without the possibility of ever receiving a jury trial, violates a fundamental policy under Missouri law.

The Missouri Supreme Court has explicitly approved the legislative scheme designed to protect Missouri franchisees and has invalidated a forum-selection clause where the clause was "unreasonable" and unfairly prejudiced the franchisee. See High Life Sales Co. v. Brown-Forman Corp., 823 S.W.2d 493, 500 (Mo. 1992). In agreeing with our Ambac decision and in interpreting Missouri franchise law, the court in High Life stated: "The Eighth Circuit Court of Appeals . . . recognized the strong public policy reflected in Chapter 407 generally" in protecting franchisees and "the very fact that this legislation is paternalistic in nature indicates that it is a fundamental policy." Id. at 498 (citing Restatement (Second) of Conflicts § 187 comment g). Consistent with holdings of our court and the Missouri Supreme Court, I would invalidate the arbitration clause

because under Missouri law it is unreasonable and unfairly prejudices Express.

Even assuming that Oklahoma law applies, the provision at issue violates the Oklahoma Constitution. The Oklahoma Supreme Court has held that "'[o]ne party may not unilaterally decide to have someone other than a jury determine the issues and thereby destroy the other's right to a jury trial.'" Masey v. Farmers Ins. Group, 837 P.2d 880, 884 (Okla. 1992) (quoting Molodyh v. Truck Ins. Exch., 744 P.2d 992, 998 (Or. 1987)).

In my view, Golf U.S.A. has the unilateral right to decide to have someone other than a jury determine the issues and thereby destroy Express's right to a jury trial. While Golf U.S.A. can sue in court for anything involving money damages, Express may never demand a jury trial and must submit to arbitration.[5] My position that the arbitration

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[5] Once one closely examines the franchise agreement, it is not hard to understand why the arbitration agreement is so truly one-sided. Clause 16.4.2 of the franchise agreement, for example, provides that Golf U.S.A. may terminate the agreement:

> If You [Express] fail to cure a default hereunder, where such default materially impairs the goodwill associated with the Golf USA name, service mark or logo; but only after You have been given written notice to cure said default and have failed to do so after 24 hours.

(J.A. at A-55). Because the provision quoted above is so broad, if Golf U.S.A. determined that Express "materially impair[ed] the goodwill associated with the Golf USA name," Golf U.S.A. could

provision violates Oklahoma law is bolstered by an unpublished opinion[6] of the Oklahoma Court of Appeals. That court explicitly stated: "Because of the special guarantee of jury trials granted by our constitution, we hold that a contractual provision purporting to grant a unilateral right to elect alternative dispute resolution procedures is not enforceable against the party demanding a jury trial." See Neighbors v. Lynn Hickey Dodge, Inc., No. 85.676

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terminate the agreement within twenty-four hours notice and sue Express in court for monies owed as a result of the alleged breach. On the other hand, as in this case, where Express claims that Golf U.S.A. materially breached their agreement, Express is forced to submit to arbitration.

[6] Although Oklahoma Supreme Court rules provide that unpublished opinions have no precedential effect, see Okla. Sup. Ct. R. 1.200(b)(5), and "shall not be . . . cited in any brief or other material presented to any court," courts interpreting this provision have found that unpublished opinions may be used for persuasive value. See, e.g., Tillon v. Capital Cities/ABC Inc., 938 F. Supp. 751, 753 n. 1 (N.D. Okla. 1995) ("Although . . . Oklahoma Court of Appeals' unpublished opinion[s] [do] not have precedential value, . . . [they may] be persuasive."); see also Farmers Ins. Group v. Stark, 924 P.2d 798, 800 (Okla. Ct. App. 1996) ("The trial court found persuasive and followed . . . an unpublished opinion . . . of this court."); Employers Mut. Cas. v. Mosby, 943 P.2d 593, 594 (Okla. 1997) (discussing Northland v. Nance, an unpublished court of appeals opinion analyzed in Farmers, and while overruling Nance because a published court of appeals opinion was on point, never suggested that lower courts could not use unpublished opinion for persuasive value). Our court has also stated that one may cite an unpublished opinion of our court if, although lacking precedential value, it has persuasive value on a material issue and no published opinion would serve as well. See 8th Cir. R. 28A(k). In this regard, I do not agree that the cases cited by the majority sufficiently address the issues before us.

at 9 (Okla. Ct. App. Aug. 6, 1996) (J.A. at A-111, A-119) (emphasis in original).[7] There can be no doubt that the Neighbors holding is both persuasive and on point with respect to this case.[8]

We are empowered to predict how the Oklahoma Supreme Court would decide this matter. In my view, Oklahoma law compels us to find that the unilateral right that Golf U.S.A. possesses in this case directly contravenes its constitution. It is for this reason that I respectfully dissent and hope that our court en banc, or the United States Supreme Court,

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[7] In Cannon v. Lane, 867 P.2d 1235 (Okla. 1993), the Oklahoma Supreme Court stated: "Because we hold that the contract before this Court is one 'with reference to insurance' and therefore an exception to the Uniform Arbitration Act, we need not address the constitutional issue of whether the contract for arbitration of future disputes deprives the petitioner of a jury trial and violates his constitutional rights under . . . the Constitution of the State of Oklahoma." Id. at 1239 n. 7. Although the court did not reach the issue, it is clear that, at the very least, it considered the question open whether arbitration clauses may deprive one of the right to a jury trial in violation of the Oklahoma Constitution. This fact, in conjunction with the holdings in Massey and Neighbors, clearly shows the error made by the majority.

[8] Interestingly, the court in Neighbors considered the Shaffer opinion, relied on so heavily by the majority, and yet still found that the arbitration clause violated the Oklahoma Constitution. See Neighbors, 85.676, at 7 (J.A. at A-117). One may question why the Oklahoma Supreme Court withdrew Neighbors from publication, rather than simply overruling it. Perhaps the reason is that "[o]pinions of the Court of Civil Appeals which apply settled precedent and do not settle new questions of law shall not be released for publication." 20 O.S. 1991, § 30.5.

corrects this transparent misapprehension of our role when hearing diversity cases.

A true copy.

Attest.

CLERK, U.S. COURT OF
APPEALS, EIGHTH CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 97-4243EMSL

Charles S. Barker,	*	
	*	
Appellant,	*	Order Denying Petition
	*	for Rehearing and
vs.	*	Suggestion for
	*	Rehearing En Banc
Golf U.S.A., Inc.,	*	
	*	
Appellee.	*	

The suggestion for rehearing en banc is denied. Judge McMillian would grant the suggestion. The petition for rehearing by the panel is also denied.

September 29, 1998

Order Entered at the Direction of the Court:

Michael E. Gans /ss/

Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

CHARLES B. BARKER, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 4:97-CV-1829 CAS
	)	
GOLF U.S.A., INC.,	)	
	)	
Defendant.	)	

MEMORANDUM AND ORDER

This diversity matter is before the Court on defendant Golf U.S.A., Inc.'s Motion to Dismiss or Transfer or, Alternatively, Motion to Stay Proceedings Pending Arbitration. Plaintiffs oppose the motion.

Background

Plaintiffs filed this action in state court, alleging they were damaged by defendant's intentional misrepresentations in connection with plaintiffs' purchase of a Golf U.S.A. store franchise. Defendant timely removed the case to this Court on the basis of diversity of citizenship, and filed the instant motion to dismiss, transfer or stay.

Defendant Golf U.S.A., Inc. ("GUSA"), an Oklahoma corporation, contends that under the terms of applicable agreements between the parties, this dispute

must be resolved through arbitration and not in the courts. Plaintiffs respond that under applicable Missouri law, the arbitration and choice of law clauses in the agreements are void and unenforceable.

In September 1995, plaintiff Express Golf, Inc. ("Express"), a Missouri corporation, entered into a Franchise Agreement with GUSA to own and operate a Golf U.S.A. golf retail store, utilizing GUSA's name, designs, system and service marks. (Ex. A to Def.'s Mot. to Dismiss.) Plaintiff Charles S. Barker, a Missouri resident, is the sole shareholder of Express. Barker entered into a Principals' Agreement with GUSA under which he, inter alia, agreed to personally guarantee Express' performance under the Franchise Agreement. (Ex. B to Def.'s Mot. to Dismiss.)

The Franchise Agreement contains the following provision concerning arbitration:

> 18.1 Any and all disputes and controversies arising out of or relating to this Agreement, performance hereunder or breach hereof, except for monies owed to Golf USA pursuant to this Agreement and except as described in Paragraph 18.5 [concerning temporary injunctive relief], shall be resolved by arbitration conducted in Oklahoma County, State of Oklahoma, in accordance with the latest existing Commercial Rules of Arbitration of the American Arbitration Association.

See Franchise Agreement at pp. 29-30.

The Franchise Agreement also contains the following choice of law provision:

> 20.1 This Agreement shall be governed by and construed in accordance with the laws of the State of Oklahoma. The parties consent to the jurisdiction of the Oklahoma County District Court and the United States District Court for the Western District of Oklahoma. In the event of any conflict, this section is subordinated to the provisions of Article 18 [concerning arbitration].

See id. at p. 31.

Finally, the Franchise Agreement contains the following provision in twelve-point bold type:

> 20.13 **You acknowledge that You have received a blank copy of this Agreement in time to afford ample opportunity to seek legal counsel, and to analyze the various provisions herein. . . .**

See id. at p. 33.

A Principals' Agreement was executed by GUSA and Barker in connection with the Franchise Agreement. This agreement incorporates the arbitration provision of the Franchise Agreement, providing in pertinent parts:

> 2. Franchise Agreement. The Principals hereby represent and warrant that they have read and understand the Franchise Agreement as a whole and all individual provisions thereof, and acknowledge that their signing of this Agreement is voluntary and as an inducement to Golf USA to enter into the Franchise Agreement with the Franchisee [Express].
>
> * * *
>
> 7. Enforcement. The provisions of the Franchise Agreement relating to the enforcement thereof are incorporated herein by this reference and shall be fully applicable to the obligations and liabilities of each of the parties hereto.

Express opened a Golf USA retail store in October 1995 in St. Louis County, Missouri. Express closed the store in June 1996, after losing money on its operation. As a result, GUSA sent to Barker a notice of termination of the Franchise Agreement dated June 28, 1996. Plaintiffs filed this action on August 4, 1997.

Discussion

Defendant GUSA moves to dismiss, stay or transfer based on the arbitration and choice of law provisions in the Franchise Agreement. Plaintiffs respond that these provisions are void and contrary to controlling Missouri law.

The Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 et seq., "embodies Congress' intent to provide for the enforcement of arbitration agreements within the full reach of the Commerce Clause." Perry v. Thomas, 482 U.S. 483, 490 (1997). Section 2 of the FAA reflects a liberal federal policy favoring arbitration agreements, despite any contrary substantive or procedural policies created by state law. Section 2 creates a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the Act's coverage. Id., 482 U.S. at 489 (citations omitted).

There are only two limitations on the enforceability of an arbitration provision covered by the FAA: (i) It must be part of a written contract "evidencing a transaction involving commerce"; and (ii) it may be revoked only upon "grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2; Southland Corp. v. Keating, 465 U.S. 1, 10-11 (1984). Federal law preempts state law with respect to the interpretation and construction of arbitration agreements falling within the scope of the FAA. Webb v. R. Rowland & Co., Inc., 800 F.2d 803, 806 (8th Cir. 1986). Thus, "traditional choice of law principles in diversity actions . . . are not available when the Federal Act applies to the case." Sanders-Midwest, Inc. v. Midwest Pipe Fabricators, Inc., 857 F.2d 1235, 1237 (8th Cir. 1988).

The first step in the Court's analysis is to determine whether the Franchise Agreement between the parties is subject to the FAA. The Court finds, and parties do not contest, that the Franchise

Agreement involves interstate commerce within the meaning of 9 U.S.C. § 2, because it involves parties located in different states and contemplates the transfer of inventory and money between those states. Thus, the Court concludes that the Franchise Agreement is governed by the FAA.

Because the Franchise Agreement does not specifically reflect that the parties agreed to submit the question of arbitrability to arbitration, the Court decides the issue. See McLaughlin Gormley King Co. v. Terminix Int'l Co., L.P., 105 F.3d 1192, 1193-94 (8th Cir. 1997) (citing First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 115 S. Ct. 1920, 1923 (1995)). Questions of arbitrability "must be addressed with a healthy regard for the federal policy favoring arbitration." Moses H. Cone Mem. Hosp., Inc. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983). As a matter of federal law, any doubts concerning the scope of arbitrable issues are resolved in favor of arbitration. Id. at 24-25.

The arbitration provision in the Franchise Agreement is broad, because it provides for arbitration of all disputes and controversies arising out of or relating to the Agreement, its performance or breach. See Fleet Tire Serv. of North Little Rock v. Oliver Rubber Co., 118 F.3d 619, 621 (8th Cir. 1997). Because plaintiffs allege fraud in the inducement, specifically misrepresentation and omission of facts regarding Express' operation and success under the Franchise Agreement, the present dispute relates to

the Agreement.[1] See, e.g., Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 406 (1967) (where plaintiff claimed that execution of agreement containing arbitration clause was procured by fraud, broad arbitration provision would be enforced); Houlihan v. Offerman & Co., Inc., 31 F.3d 692, 695 (8th Cir. 1994). As a result, the parties' dispute in this case must be submitted to arbitration.

Plaintiffs contend, however, that the arbitration clause and the choice of law provision are unenforceable under Missouri law. As a threshold matter, because the Franchise Agreement provides that it is to be interpreted under Oklahoma law, this Court would follow the contractual choice of law provision. See Houlihan, 31 F.3d at 695, n. 3. Plaintiffs' contention that the choice of law provision is unenforceable because it is contained within a contract of adhesion is unpersuasive, for reasons discussed below.

Plaintiffs argue the arbitration clause is unenforceable because it is contained within a contract of adhesion, fails for want of mutuality and consideration, is unconscionable, and violates public policy. These arguments are properly decided by an arbitrator, not the Court, because they go to the formation of the entire Franchise Agreement. See,

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[1] Plaintiffs do not contend that only the arbitration clause of the Franchise Agreement was induced by fraud, or that the alleged misrepresentations relate only to the arbitration clause. Such a claim may be adjudicated by a federal court. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403-04 (1967); see Houlihan v. Offerman & Co., Inc., 31 F.3d 692, 695 (8th Cir. 1994).

e.g., Prima Paint, 388 U.S. at 402-06; Houlihan, 31 F.3d at 696 n. 5; Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Haydu, 637 F.2d 391, 398 (5th Cir. 1981).

Nonetheless, the Court finds plaintiffs' arguments unavailing. Plaintiffs fail to provide any factual support for their assertion that the Franchise Agreement is a contract of adhesion because the parties were of unequal bargaining power and the Franchise Agreement was offered only on a take-it-or-leave-it basis. As a result, this argument fails. See Rodriguez de Quijas v. Shearson/American Exp., Inc., 490 U.S. 477, 484 (1989). Further, "The use of a standard form contract between two parties of admittedly unequal bargaining power does not invalidate an otherwise valid contractual provision. To be invalid, the provision at issue must be unconscionable." Webb, 800 F.2d at 807 (quoting Surman v. Merrill Lynch, Pierce, Fenner & Smith, 733 F.2d 59, 61 n. 2 (8th Cir. 1984)). The Eighth Circuit has held there is nothing inherently unfair about arbitration clauses, and they are therefore valid and enforceable. Surman, 733 F.2d at 61 n. 2. Plaintiffs fail to make a showing that the arbitration clause is unconscionable or inherently unfair.

Nor does the Court agree with plaintiffs' contention that the arbitration clause lacks mutuality of obligation. In order for there to be adequate mutuality, it is not essential that both parties be required to arbitrate every type of claim which may arise under an agreement. It is sufficient if both parties agree to arbitrate some claims. Hull v. Norcom, Inc., 750 F.2d 1547, 1548-50 (11th Cir. 1985)

(citing Riccardi v. Modern Silver Linen Co., Inc., 356 N.Y.S.2d 872, 875-76 (N.Y.A.D. 1974)); Seymour v. Gloria Jean's Coffee Bean Franchising Corp., 732 F. Supp. 988, 995-96 (D. Minn. 1990). In this case, the parties agreed to arbitrate most claims either might have arising under the Franchise Agreement, with the exception of claims for monies owed by Express to GUSA under the Agreement. As a result, sufficient mutuality of obligation exists. See C.H.I., Inc. v. Marcus Bros. Textile, Inc., 930 F.2d 762, 764 (9th Cir. 1991).

Plaintiffs' argument that the arbitration clause violates some nebulous Missouri public policy is also without merit. As previously noted, the FAA favors arbitration agreements, despite any contrary substantive or procedural policies created by state law. Perry v. Thomas, 482 U.S. at 490 (under Supremacy Clause, provision of FAA preempted California statute which stated that wage collection actions could be maintained without regard to existence of agreement to arbitrate); see Webb, 800 F.2d at 806-07 (federal law preempted a Missouri statute which provided that arbitration agreements in contracts of adhesion would not be enforced).

Consequently, the only issue remaining for decision is whether this case should be dismissed, transferred, or stayed.[2] Under section 3 of the FAA,

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[2] Defendants have not moved to compel arbitration. Under the weight of authority, this Court lacks the power to compel the parties to arbitrate their dispute in another district, or to arbitrate in this district where the Franchise Agreement specifies arbitration in Oklahoma. See, e.g., Merrill Lynch,

federal courts have the authority to stay an action pending arbitration, upon application by one of the parties. This provision does not limit dismissal of a case, however, when all of the issues raised in the complaint must be submitted to arbitration. See, e.g., Alford v. Dean Witter Reynolds, Inc., 975 F.2d 1161, 1164 (5th Cir. 1992); Sparling v. Hoffman Constr. Co., Inc., 864 F.2d 635, 638 (9th Cir. 1988); E.E.O.C. v. Frank's Nursery & Crafts, Inc., 966 F. Supp. 500, 505-06 (E.D. Mich. 1997); Hoffman v. Fidelity and Deposit Co. of Maryland, 734 F. Supp. 192, 195 (D.N.J. 1990). Where all issues in a case must be submitted to arbitration, it serves no purpose to retain jurisdiction and stay an action, or to transfer it to another district. This is also true with regard to post-arbitration remedies, which would not involve a plenary review of the merits of the dispute but rather are limited to a review of the arbitrator's award in the manner provided by law. See Alford, 975 F.2d at 1164. As a result, the Court concludes this matter should be dismissed.

Conclusion

For the foregoing reasons, the Court concludes that the parties' dispute must be resolved by arbitration, and this matter should be dismissed. Defendant's Motion to Dismiss will be granted, and its alternative motions will be denied as moot.

Accordingly,

Pierce, Fenner & Smith, Inc. v. Lauer, 49 F.3d 323, 328 (7th Cir. 1995), and cases cited therein.

IT IS HEREBY ORDERED that defendant Golf U.S.A., Inc.'s Motion to Dismiss is **GRANTED**. [Doc. 4-1]

IT IS FURTHER ORDERED that defendant's alternative motions to transfer or to stay pending arbitration are **DENIED as moot**. [Doc. 4-2, -3]

An appropriate order of dismissal will accompany this memorandum and order.

Charles A. Shaw /ss/
CHARLES A. SHAW
UNITED STATES
DISTRICT JUDGE

Dated this 17th day of November, 1997.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

CHARLES B. BARKER, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 4:97-CV-1829 CAS
	)	
GOLF U.S.A., INC.,	)	
	)	
Defendant.	)	

ORDER OF DISMISSAL

In accordance with the memorandum and order of this date and incorporated herein,

IT IS HEREBY ORDERED that plaintiffs' Complaint is **DISMISSED**.

Charles A. Shaw /ss/
CHARLES A. SHAW
UNITED STATES
DISTRICT JUDGE

Dated this 17th day of November, 1997.

Supreme Court, U.S.
FILED
NOV 24 1998
CLERK

(3)

No. 98-644

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

CHARLES S. BARKER and EXPRESS GOLF, INC.,

Petitioners,

vs.

GOLF U.S.A., INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY TO BRIEF IN OPPOSITION

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14 pp

QUESTIONS PRESENTED

I. **Whether the Federal Arbitration Act preempts state choice of law and forum selection substantive rules, applicable to all contracts and in all cases, when an arbitration clause is included.**

II. **Whether state law overrides the federal doctrine of separability established by Prima Paint v. Flood & Conklin Mfg. in cases governed by the Federal Arbitration Act.**

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No. 98-644

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

CHARLES S. BARKER and EXPRESS GOLF, INC.,

Petitioners,

vs.

GOLF U.S.A., INC.,

Respondent.

REPLY TO BRIEF IN OPPOSITION

The opinion below is now reported as Charles S. Barker, et al. v. Golf U.S.A., Inc., 154 F.3d 788 (8th Cir. 1998).

ARGUMENT

I. Certiorari is required to distinguish the issues governed by federal policy from those governed by general state contract law principles.

Golf U.S.A. argues that Oklahoma law does not require mutuality of obligation in arbitration clauses, relying upon Shaffer v. Jeffery, 915 P.2d 910 (Okla.

1996) in the same fashion as the majority opinion below. (Respondent's Brief, p. 12). Golf U.S.A. also misstates the issue as whether the Oklahoma Arbitration Act requires mutuality of obligation – not whether the Federal Arbitration Act and the doctrine of separability requires that the arbitration clause be treated as a separate contract – followed by its conclusion that the majority opinion below therefore does not conflict with Prima Paint v. Flood & Conklin, 388 U.S. 395 (1967). (Respondent's Brief, p. 12). Petitioners respectfully submit that this misses the point entirely. Prima Paint established the doctrine of separability as a federal policy developed under the Federal Arbitration Act, 9 U.S.C. § 1, et seq. Conflicting state law (either by statute or judicial decision) is preempted by this federal policy. Unlike Shaffer v. Jeffery, the case at bar is governed by the Federal Arbitration Act.

Neither the Eighth Circuit nor Golf U.S.A. have distinguished the issues governed by general state contract law principles from the issues governed by the federal policy developed under the Federal Arbitration Act. The difficulty the lower courts have in determining which issues are governed by general state contract law and which are governed by federal policy under the Federal Arbitration Act emphasizes the need for granting certiorari.

II. The majority opinion below failed to apply Missouri choice of law rules, as required in diversity cases, but instead gave undue deference to a misperceived "strong federal policy favoring arbitration."

Golf U.S.A. argues that the Court below correctly held that Oklahoma law governs the franchise agreement. (Respondent's Brief, pp. 6-9). The Eighth Circuit, however, failed to acknowledge or apply Missouri's choice of law rules (applicable in all diversity cases), stating simply that no persuasive reason was advanced for setting aside the choice of law provision in the contract, including the reasons articulated by the dissent. (Appendix, pp. 5a, 11a-14a). Missouri law enforces choice of law clauses unless to do so would violate a fundamental policy of Missouri. The majority opinion failed to discuss whether the choice of law clause would violate a fundamental policy of Missouri, because it was unduly concerned with its perception that failure to enforce the contract terms might "risk running afoul of the strong federal policy favoring arbitration." (Appendix, p. 8a).

Petitioners submit that application of Missouri's choice of law rules in this diversity case, as required, would have resulted in refusal to enforce the choice of law and choice of forum clauses because they conflict with Missouri public policy.

Golf U.S.A.'s unfair method of resolving disputes also conflicts with the general purpose of the Missouri Franchise Act, which was designed "to regulate the marketplace to the advantage of those traditionally thought to have unequal bargaining power as well as those who may fall victim to unfair business practices* * *" as "paternalistic legislation designed to protect those that could not otherwise protect themselves, * * *." High Life Sales Co. v.

Brown-Forman Corp., 823 S.W.2d 493, 498 (Mo. Banc 1992).

But for the majority's wish not to risk "running afoul of the strong federal policy favoring arbitration," the Eighth Circuit would have applied Missouri choice of law and choice of forum principles, generally applicable in all contract cases.

The failure of the Court below to apply basic contract law principles in a diversity case because the contract contained an arbitration clause reinforces the need to grant certiorari in this case. Most inferior courts have interpreted the recent rulings by this Court as mandating enforcement of all arbitration agreements, no matter how unfair, one-sided or oppressive.

Certiorari is required to establish the dividing line between issues governed by federal policy under the Federal Arbitration Act and issues governed by general state contract law principles that determine the validity and enforceability of these unfair, oppressive, one-sided arbitration contracts.

III. The Petition was properly presented to this Court by the Petitioners' attorney who is admitted and properly qualified to practice here.

Golf U.S.A. argues that the Petition "may" not be properly before the Court. (Respondent's Brief, p. 6). Golf U.S.A. claims an obligation to bring before the Court certain sanction awards against David Duree in several cases involving Doctor's Associates,

Inc. ("DAI"), the franchisor for Subway Sandwich Shops, under Supreme Court Rules 5, 8 and 15.

David Duree has been actively practicing law for 27 years, and is a member, in good standing, of the United States Supreme Court, the Supreme Court of Missouri, the Supreme Court of Illinois, the United States District Courts for Eastern Missouri, Southern Illinois and Central Illinois and the United States Courts of Appeal for the Second, Fifth, Seventh, Eighth and Federal Circuits. No disciplinary actions have been brought against him by any of these courts or the disciplinary commissions of Missouri or Illinois, the two states in which he is licensed.

Three of the sanction awards were entered by the Honorable Janice Russell in Johnson County, Kansas. One award was for an unintentional failure to produce documents to DAI. The second award was for allegedly signing pleadings in bad faith. None of those pleadings had been signed by Mr. Duree. He attempted to appeal that award, but the appeal was held to be premature because portions of the underlying case are still pending. The final award for $408,445.25 and removing Mr. Duree's authority to practice *pro hac vice* was entered pursuant to motions filed by DAI. Judge Russell subsequently admitted that she had become unable to be fair and impartial in considering matters concerning Mr. Duree before these rulings were entered, as a result of an *ex parte* communication with John Gerstle, which caused Judge Russell to incorrectly believe that Mr. Duree's client had a drug problem, that Mr. Duree knew of it, and that this drug problem was the cause of an

amended tax return which Judge Russell also concluded was false and fraudulent.

Judge Russell subsequently testified that this *ex parte* conversation occurred seven days before her initial ruling against Mr. Duree. Mr. Gerstle testified that he believed the conversation had occurred much earlier. Eight weeks after the date on which Judge Russell contended the conversation occurred, without having disclosed her inability to be fair and impartial, Judge Russell presided over a disputed hearing about the final judgment (journal entry) to be entered with respect to her rulings against Mr. Duree. Over objection, she accepted a formal judgment drafted by the attorneys for DAI, which included numerous findings not contained within her original memorandum order which was entered seven days after she now admits she was unable to be fair and impartial.

Before hearing Mr. Duree's motion to set aside these orders, Judge Russell recused herself and disclosed her inability to be fair and impartial. The successor judge subsequently stated that he did not believe it was his job to second guess Judge Russell on these matters, and the case was appealed to the Kansas Supreme Court, where it was argued on October 28, 1998.

Mr. Duree respectfully submits there is nothing wrong with the amended tax return – it has been on file with the Internal Revenue Service, which has not challenged it, for more than five years. There was no evidence that it did not accurately state the tax

liabilities of Mr. Duree's clients and their taxable income or loss. Furthermore, Mr. Duree was charged with using the amended tax return to mislead Judge Russell in responding to DAI's summary judgment motion during 1995. At that time, Judge Russell ruled that the original and amended tax returns were not material to that proceeding. There was also no evidence that Mr. Duree used the amended tax return in any way, either in oral argument or in the pleadings, to mislead Judge Russell, or for any purpose. Judge Russell also ruled that other attorneys representing the same clients as Mr. Duree, who had actually signed the pleadings cpposing DAI's summary judgment motion, engaged in no wrongdoing. There was no evidence that Mr. Duree had read the amended tax return, or knew of its contents, at the relevant time, and Mr. Duree testified, accurately, that he had not read the amended tax return, and did not know of its contents, until long after DAI filed its motions against him. Mr. Duree believes that the Kansas Supreme Court will reverse these decisions. If it does not, he will certainly apply to this Court for certiorari.

The disciplinary commissions of Illinois, Missouri and Kansas have not initiated any proceedings against Mr. Duree. They merely opened informational files when Judge Russell, at the urging of DAI, sent a copy of her initial rulings to the Illinois and Missouri disciplinary commissions. One of DAI's attorneys sent another copy to the Kansas disciplinary commission. Mr. Duree has not been interviewed by the disciplinary commissions of Missouri, Illinois or Kansas, no investigation has been undertaken, and these disciplinary commissions

have done nothing more than open informational files and receive copies of the pleadings filed in the Kansas courts.

Thompson Coburn, the lead attorneys for Golf U.S.A., also represent DAI (the Subway franchisor) in several cases in which David Duree represents the franchisees. All seven sanctions awards that Thompson Coburn, on behalf of Golf U.S.A., described at p. 6 of Respondent's Brief, were entered at the request of DAI, which has filed numerous motions for sanctions and for contempt awards against Mr. Duree in the past 10 years. This is a standard litigation tactic for DAI, which uses motions for sanctions and the threat of motions for sanctions and motions for contempt as a routine litigation tactic. DAI threatened Mr. Duree's attorney in Kansas with sanctions if he did not withdraw Mr. Duree's position based upon Judge Russell's admitted inability to be fair and impartial and filed one other sanction motion against Mr. Duree's Kansas attorney, which was denied.

When litigating with DAI, it is necessary to prevail on almost every issue to avoid being subjected to a motion for sanctions or the threat of a motion for sanctions. One of the sanctions awards was for $80.00. With the exception of the $408,445.25 award in the Subway v. Kessler case, and the award for an unintentional violation of a discovery requirement described above, all awards were for pursuing claims against DAI, which the court in question ultimately found to be without merit.

On the other hand, DAI and its two owners, Frederick DeLuca and Peter Buck, have a long history of judgments against them for fraud and related misconduct. During 1997, Frederick DeLuca received income of $120,000,000.00 and Peter Buck received income of $73,000,000.00 from their Subway operation, and from investing the wealth obtained therefrom. Some of the cases finding DAI, Frederick DeLuca and Peter Buck liable for fraud and/or oppressive conduct with respect to the landlords and franchisees with whom they do business include Jannotta v. Doctor's Associates, Inc., 125 F.3d 503 (7th Cir. 1997); Cox v. Doctor's Associates, Inc., 613 N.E.2d 1306, 184 Ill. Dec. 714 (Ill. App. 1993), appeal denied, 622 N.E.2d 1202 (Ill. 1993), cert. denied, 510 U.S. 1118 (1994); Yates v. Doctor's Associates, Inc., 549 N.E.2d 1010, 140 Ill. Dec. 359 (Ill. App. 1990); Subway Restaurants, Inc., et al. v. Riggs, 696 N.E.2d 733, 231 Ill. Dec. 437 (Ill. App. 1998); Pine Tree Associates v. Doctor's Associates, Inc., 654 So. 2d 735 (La. App. 1995), writ denied, 661 So. 2d 467 (La. 1995), along with numerous, other, unreported decisions. In 1997, while Mr. DeLuca was receiving $120,000,000.00 and Mr. Buck was receiving $73,000,000.00, their assetless, alter-ego, leasing companies, including Subway Sandwich Shops, Inc., Subway Restaurants, Inc. and Subway Real Estate Corp. had a number of unpaid judgments against them which had been pending and unpaid for many years. See Jannotta v. Doctor's Associates, Inc., supra.

DAI uses an extremely oppressive, unfair and one-sided franchise agreement. The terms are not negotiable. See the petition for certiorari filed by Erik

Hamilton against Doctor's Associates, Inc., Supreme Court No. 98-630, now pending before this Court. DAI's brief in opposition is due by December 15, 1998.

Golf U.S.A.'s suggestion (Respondent's Brief, p. 6) that it was required to bring these matters to the Court's attention under Supreme Court Rules 5, 8 and 15 is unfounded. Mr. Duree is already admitted to this Court. There is no basis in fact for suggesting that he should be disbarred by this Court. This suggestion by Golf U.S.A. is simply an attempt to distract the Court's attention from the merits of the issues presented here.

CONCLUSION

For the reasons stated in the Petition, and in this Reply Brief, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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No. 98-644

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

CHARLES S. BARKER and EXPRESS GOLF, INC.,
Petitioners,

vs.

GOLF USA, INC.,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

RESPONDENT GOLF USA, INC.'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Was the Eighth Circuit correct in finding that Oklahoma law governed the Franchise Agreement?

2. Was the Eighth Circuit correct in finding that Oklahoma law does not require mutuality of obligation in arbitration provisions where the underlying contract is supported by consideration?

PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceedings. There are no parent companies or subsidiary companies to be listed.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Factual Background:

This action arises from a Franchise Agreement entered between Petitioner Express Golf, Inc. ("Express") and Golf USA, Inc. ("Golf USA") dated September 18, 1995 for the purpose of operating a Golf USA retail store utilizing Golf USA's methods, name, designs, system and service marks. (the "Franchise Agreement"); A-31.[1] On the same day, Petitioner Charles S. Barker ("Barker"), entered into an agreement with Golf USA whereby Barker agreed, among other things, to guarantee the performance of Express' obligations under the Franchise Agreement and to arbitrate any disputes thereunder consistent with the terms of the Franchise Agreement. (the "Barker Agreement"); A-80.

In the Franchise Agreement, the parties agreed to the following relevant terms:

> Any and all disputes and controversies arising out of or relating to this Agreement, performance hereunder or breach hereof, except for monies owed to Golf USA pursuant to this Agreement and except as described in Paragraph 18.5, shall be resolved by arbitration conducted in Oklahoma County, State of Oklahoma, in accordance with the latest existing Commercial Rules of Arbitration of the American Arbitration Association.

Franchise Agreement, ¶ 18.1; A-59. Paragraph 18.5 of the Franchise Agreement provides that "[n]othing herein contained shall bar the right of either party to seek and obtain temporary injunctive relief from a court of competent jurisdiction in accor-

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[1] Citations to the Joint Appendix filed with the United States Court of Appeals for the Eighth Circuit are designated as "A-__".

dance with applicable law against threatened conduct that will cause loss or damage, pending completion of arbitration." Franchise Agreement, ¶ 18.5; A-60. The Franchise Agreement also contains the following provision:

> This Agreement shall be governed by and construed in accordance with the laws of the State of Oklahoma. The parties consent to the jurisdiction of the Oklahoma County District Court and the United States District Court for the Western District of Oklahoma. In the event of any conflict, this section is subordinated to the provisions of Article 18 [i.e., arbitration provision].

Franchise Agreement ¶ 20.1; A-61. Finally, the Franchise Agreement contains the following provision which is provided in 12-point bold-typeface:

> **You acknowledge that You have received a blank copy of this Agreement in time to afford ample opportunity to seek legal counsel, and to analyze the various provisions herein. . . .**

Franchise Agreement ¶ 20.13; A-63.

The Barker Agreement incorporated the arbitration provision of the Franchise Agreement. In the Barker Agreement, Golf USA and Barker agreed to the following provisions:

> 1. Franchise Agreement. The Principals hereby represent and warrant that they have read and understand the Franchise Agreement as a whole and all individual provisions thereof, and acknowledge that their signing of this Agreement is voluntary and as an inducement to Golf USA to enter into the Franchise Agreement with the Franchisee [Express].

* * *

> 7. Enforcement. The provisions of the Franchise Agreement relating to the enforcement thereof are incorporated herein by this reference and shall be fully applicable to the obligations and liabilities of each of the parties hereto.

Barker Agreement ¶¶ 2, 7; A-80 and A-82.

Significantly, Express voluntarily closed its Golf USA retail outlet store less than nine months after execution of the Franchise Agreement because "the store failed financially" and "could not generate sufficient sales to meet expenses." Pet. ¶ 19, A-15. After the store was closed and was no longer in operation, Golf USA followed its standard practice of issuing a notice of termination under the terms of the Franchise Agreement so that the territory assigned to Express could be re-issued to another Franchise. A-88-90.

In an attempt to avoid the arbitration agreement with Golf USA, and to find an advantageous forum, Petitioners filed suit on August 4, 1997 in state court. Pet., A-11. The Petitioners alleged that Golf USA made certain misrepresentations and wrongful omissions related to the operation and success of Express' business under the Franchise Agreement. Pet., A-11.

Procedural Background:

The case was timely removed by Golf USA to the United States District Court for the Eastern District of Missouri. Notice of Removal, A-6. Upon removal, Golf USA filed an alternative Motion to Dismiss, Transfer or Stay. A-18. After Petitioners had an opportunity to file a response to Golf USA's Motion and Golf USA filed a Reply in support of its Motion, the District Court entered its judgment. Petitioners' Response, A-97; Golf USA's Reply, A-121.

The District Court's Memorandum and Order dated November 17, 1997 granted Golf USA's Motion to Dismiss and denied as moot Golf USA's alternative motions to transfer or to stay

pending arbitration. Mem. and Order, A-143. In its Memorandum and Order, the District Court held that the Franchise Agreement was to be governed by the Federal Arbitration Act. Mem. and Order, A-147. The District Court went on to find that the arbitration provision in the Franchise Agreement was broad as it provided for arbitration of all disputes and controversies arising out of or relating to the Franchise Agreement, its performance or breach. *Id.* Accordingly, the District Court held that the Petitioners' claims, relating to misrepresentation and omission of facts regarding Express' operation and success under the Franchise Agreement, related to the Agreement and as a result must be submitted and resolved by arbitration. *Id.* Moreover, the District Court held that the Petitioners' arguments that the arbitration clause is unenforceable because it is contained within a contract of adhesion, fails for want of mutuality and consideration, is unconscionable, and violates public policy were to be "decided by an arbitrator, not the court, because they go to the formation of the entire Franchise Agreement." Mem. and Order, A-148. Even though the District Court held that these issues should be decided by an arbitrator, the District Court addressed and disposed of each of Petitioners' arguments, specifically finding that the arbitration provision did not violate Missouri public policy. Mem. and Order A-148-150.

The District Court then went on to decide whether the case should be dismissed, transferred, or stayed. The Memorandum and Order states, "[w]here all issues in a case must be submitted to arbitration, it serves no purpose to retain jurisdiction and stay an action, or to transfer it to another district." Mem. and Order, A-151. Therefore, the District Court concluded that the matter should be dismissed.[2] *Id.*

[2] After the District Court entered its Memorandum and Order dismissing the case, Golf USA filed a Motion for Attorneys' Fees relating to fees and expenses incurred in connection with the litigation filed by Petitioners contrary to the arbitration agreement. Golf USA's motion has been refiled before the Eighth Circuit seeking Golf USA's attorney's fees and costs relating to this appeal as well.

The Petitioners then filed an appeal with the Eighth Circuit Court of Appeals arguing that the arbitration clause was unconscionable, void and unenforceable; that the arbitration clause violates Missouri public policy; that the arbitration clause lacks mutuality of obligation and is unsupported by consideration; that Golf USA waived its right to compel arbitration by seeking its attorney's fees and costs after dismissal; that state law, rather than federal law should determine the interpretation, formation, validity and enforceability of the arbitration clause; and that Missouri law rather than Oklahoma law should determine the interpretation, formation, validity and enforceability of the arbitration clause. Appellants' Brief at pp. 12-15.

The Eighth Circuit held that because the parties included a choice-of-law provision which stated that the Franchise Agreement shall be governed by and construed in accordance with the laws of the State of Oklahoma, Oklahoma law governed the determination of the validity of the arbitration clause. Pet. App. at p. 52. The Eighth Circuit recognized the Petitioners' argument that the choice-of-law provision should be set aside stating: "No persuasive reason having been advanced for setting aside the choice-of-law provision upon which the parties agreed in their contract, we reject this argument and conclude that Oklahoma law applies." *Id.*

The Eighth Circuit also held that the Oklahoma Supreme Court would not separately require mutuality of obligation in arbitration clauses based on the Oklahoma Supreme Court case of *Shaffer v. Jeffery*, 915 P.2d 910 (Okla. 1996). Pet. App. at p. 73. Accordingly, the Eighth Circuit affirmed the District Court's dismissal of the Petitioners' lawsuit.

The Petitioners then filed a Petition for Rehearing and for Rehearing *en Banc* which was denied by the Eighth Circuit on September 29, 1998.

REASONS FOR DENYING THE WRIT

As an initial matter, it should be noted that the Petitioners' Petition may not be properly before this Court. Supreme Court Rule 5 states that any person qualified to practice before this Court must not have been the subject of any adverse disciplinary action pronounced or in effect three years before the date of admission. Petitioners' counsel, David M. Duree, has been sanctioned seven times by four different courts and has been referred to the disciplinary authorities in Illinois and Missouri (the states in which he is licensed) after his *pro hac vice* admission in Kansas was revoked by a Kansas trial judge in the case of *Subway Restaurants, Inc., et al. v. Nancy Kessler, et al.*, Case No. 90C12370 in the District Court of Johnson County, Kansas, and he was fined $408,445.25 after finding that he had "deliberately caused to be prepared a false [federal income] tax return for use in . . . litigation." Although the matter is currently on appeal to the Kansas Supreme Court, Golf USA feels that it has an obligation to bring this matter before the Court's attention under Supreme Court Rules 8 and 15.

I. The Eighth Circuit Correctly Held That Oklahoma Law Governed The Franchise Agreement.

The Petitioners admit, in their Petition, that they closed their store during June, 1996 because the store failed financially and could not generate sufficient sales to meet expenses. Pet. at p. 5, ¶ 21; A-15.

The Petitioners make a convoluted argument that the parties' choice of law provision which states that Oklahoma law governs the Franchise Agreement should be set aside because it somehow violates a public policy of the State of Missouri. Initially, the Petitioners argued to the Eighth Circuit that the choice of law provision violated Missouri public policy simply because it contained a choice of law provision other than Missouri on the theory that Missouri's "paternalistic" Franchise Act prohibits

the application of the law of any state other than Missouri for contracts entered by Missouri franchises. As Golf USA pointed out in its Response to Petitioners' Petition For Rehearing and Rehearing *En Banc*, Missouri has enacted the Missouri Merchandising Practices Act RSMo. § 407.400 *et seq.*, not a "Missouri Franchise Act" which is a consumer protection statute not unlike the Oklahoma Consumer-Protection Act, 15 Okl.St. § 751, *et seq.*, and that the mere existence of the Missouri Merchandising Practices Act does not render all choice of law provisions other than Missouri *per se* void as violative of a fundamental public policy of the State of Missouri.

Petitioners now argue, for the very first time, that the choice of law provision violates a fundamental public policy of the State of Missouri because the Missouri Merchandising Practices Act requires 90 days notice for the termination of franchises whereas the Franchise Agreement simply required 24-hour notice of termination. This argument is raised in the Petition for a Writ of Certiorari despite the fact (1) that it was not raised before the District Court or the Eighth Circuit; (2) more importantly, the termination provision of the Franchise Agreement was not implicated in this suit because the Petitioners voluntarily closed their Franchise; and (3) even if the termination provision conflicted with the Missouri Merchandising Practices Act, if it were violated, the arbitration panel would apply the Act and award the appropriate damages. Therefore, the termination provision in no way impacts whether this case should be submitted to arbitration or litigation.

Quite simply, Golf USA did not terminate the Petitioners, therefore, the alleged violation of a fundamental public policy of the State of Missouri is hypothetical, inapplicable and not a sound basis for appeal. *See International Union of Operating Engineers, Local 369 v. Office of Professional Employees Union, Local 367*, 66 F.3d 325, (6th Cir. 1995) (alleged public policy violation based on a hypothetical situation is meritless).

Further, the cases cited by the Petitioners in support of their claim that the choice of law provision violates a fundamental public policy of the State of Missouri are inapplicable. *Electrical and Magneto Serv. Co. v. AMBAC Int'l Corp.*, 941 F.2d 660 (8th Cir. 1991), actually involved a factual situation in which a franchisor terminated a franchisee without giving the statutory notice required under the Missouri Merchandising Practices Act. *Id.* at 661. *High Life Sales Co. v. Brown-Forman Corp.*, 823 S.W.2d 493 (Mo. 1992), involved a Missouri statute which provides that no licensed liquor distributor may be terminated except for good cause. *Id.* at 498. Under the forum selection provision contained in the distributorship agreement involved in that case, the franchisee would have been required to bring suit in Kentucky which did not afford the same protections. *Id.* at 495. The Franchisor terminated the Franchisee without good cause and the Court found that applying the forum selection clause would violate a fundamental public policy of the State of Missouri in regulating its liquor distributors. *Id.* at 498. The Court, however, specifically held that Missouri should no longer treat outbound forum selection clauses as *per se* violations of public policy. *Id.* at 496. Here, the Petitioners have failed to establish that the parties' choice of law provision violates any fundamental Missouri public policy.

Finally, even if the termination provision had been implicated in this suit, it would not have affected the issue of whether this case should be submitted to arbitration. For example, if Golf USA had terminated the Petitioners' Franchise Agreement in violation of the Missouri Merchandising Practices Acts' 90 days notice provision, the Petitioners could present evidence of this violation to the arbitration panel for their consideration and ruling. This issue, however, is purely hypothetical since Golf USA did not terminate the Franchise Agreement. Nonetheless, it is clear that the parties' choice of law provision in no way violates a fundamental public policy of the State of Missouri.

In the absence of a violation of a fundamental public policy of Missouri, Missouri choice of law rules apply the law of the State chosen by the parties to govern their contractual rights and duties. *See East Prairie R-2 School Dist. v. U.S. Gypsum Co.*, 813 F. Supp. 1396, 1401 (E.D. Mo. 1993); *Nakao v. Nakao*, 602 S.W.2d 223, 226 (Mo. App. 1980); Restatement (Second) Conflicts of Laws § 187(1) (1988). In this case, the parties chose the law of Oklahoma to govern their contractual rights and the Eighth Circuit correctly held that Oklahoma law governed the Franchise Agreement.

II. The Eighth Circuit Correctly Held That Oklahoma Law Does Not Require Mutuality of Obligation in Arbitration Provisions Where The Underlying Contract Is Supported by Consideration.

Petitioners argue that the arbitration provision of the Franchise Agreement is void because it lacks mutuality of obligation and is unsupported by consideration. However, the arbitration provision does not lack mutuality of obligation and was supported by consideration. The plain language of the arbitration clause excepts from arbitration only those instances in which money due Golf USA pursuant to the Franchise Agreement is owed:

> Any and all disputes and controversies arising out of or relating to this Agreement, performance hereunder or breach thereof, *except for monies owed to Golf USA pursuant to this Agreement* and except as described in Paragraph 18.5, shall be resolved by arbitration . . . .

Franchise Agreement ¶ 18.1; A-59 (emphasis added). This clause does *not* exempt all conceivable claims as the Petitioners contend. In fact, the clause covers only three terms in the Franchise Agreement which contemplate money owed to Golf USA: the franchise fee, the royalty fee, and advertising fee. *See*, Franchise Agreement, ¶¶ 3.1, 7.1, and 12.6; A-33, 38 and 49.

Those are the only instances in the contract which contemplate "monies owed to Golf USA." There is a fourth instance in which money may be owed to Golf USA, however, it is applicable only if the Franchise Agreement is terminated and the Petitioners fail to comply with the termination provisions, in which case Golf USA would be entitled to liquidated damages until the franchisee complies with the provisions of the termination clause. The termination clause requires such things as executing documents to release their rights to territories, use of the name Golf USA, the transfer of telephone listings, abiding by covenants not compete and confidentiality agreements, etc. *See* Franchise Agreement, ¶ 16.7, A-56-57.

The Franchise Agreement is replete with provisions under which the arbitration clause could apply to both parties. Indeed, dozens of potential claims could be conceived by Golf USA against the Petitioners which are not excluded from the arbitration agreement. For example, Article 2, section 2.2.3 (p. 2, A-32), reads: "If You relocate your Store, You will have to conform the new Store to the then current standards of basic store design for new franchises." Franchise Agreement, ¶ 2.2.3, A-32. Had the Petitioners relocated their store without any consideration for current basic store design and trade dress standards and Golf USA sought to enforce this section, it could not have done so in any manner other than arbitration unless there was a basis for injunctive relief or Golf USA sought to terminate the entire business relationship. Quite simply, failure to abide by this section does not constitute "monies owed to Golf USA pursuant to this Agreement." As such, the arbitration clause is fully applicable, as it is in nearly all possible breaches of the Franchise Agreement (other than payment of franchise, royalty, and advertising fees).

The Petitioners argue that because Article 16, Section 16.4.2 of the Franchise Agreement allows Golf USA to terminate the agreement if the Petitioners fail to cure a default which "materi-

ally impairs the good will associated with the Golf USA name, service mark or logo" after 24 hours written notice that it, in effect, allows Golf USA to sue for monies owed for any alleged breach of the Franchise Agreement and bring suit in court. This position, however, fails to recognize that if the Petitioners were in breach of the Franchise Agreement and Golf USA wanted them to comply with the terms of the contract but did not want to terminate the whole agreement, they would be required to submit its claims to arbitration. Further, if the Petitioners breached the Franchise Agreement but did not owe Golf USA any money under the agreement and otherwise complied with the provisions of Article 16, Section 16.7, they would not owe money under the Franchise Agreement. Therefore, the arbitration provision does not lack mutuality of obligation.

The District Court also disagreed with the Appellants' contention that the arbitration clause lacks mutuality of obligation. The District Court correctly noted that in order for there to be mutuality, it is not necessary that both parties be required to arbitrate every type of claim under an agreement. Rather, "[i]t is sufficient if both parties agree to arbitrate some claims." Mem. and Order, p. 7; A-149. The District Court also held that the parties had agreed to arbitrate most claims arising under the Franchise Agreement, with the exception of claims for monies owed by Petitioners and that: "As a result, sufficient mutuality of obligation exists." Mem. and Order, p. 8; A-150 (citing *C.H.I. Inc. v. Marcus Bros. Textile, Inc.*, 930 F.2d 762, 764 (9th Cir. 1991)).

As noted above, Petitioners' argument that Golf USA has not promised to arbitrate any claim is simply wrong. Only claims for monies owed to Golf USA *pursuant to the Franchise Agreement* are exempted from the arbitration clause. Petitioners' action does not involve a claim for monies owed under the Franchise Agreement.

Furthermore, there was no reason to make this exception to the arbitration clause mutual since no provision of the Franchise Agreement obligates Golf USA to pay money to the Petitioners. Therefore, a mutual term for the Petitioners to seek amounts due pursuant to the Franchise Agreement in court would have been meaningless since the Franchise Agreement does not contemplate any monies being paid to the franchisee by Golf USA. Additionally, the inclusion of such a meaningless provision would have been confusing and may have unnecessarily created an ambiguity in the Franchise Agreement. As the District Court found, Petitioners' arguments concerning lack of mutuality and consideration are simply without merit.

Even though the arbitration provision does not lack mutuality of obligation, the majority opinion recognized that the Oklahoma Supreme Court would not even require mutuality of obligation in arbitration clauses based on the decision of *Shaffer v. Jeffery*, 915 P.2d 910 (Okla. 1996). In *Shaffer*, the Oklahoma Supreme Court recognized that the separability doctrine established by *Prima Paint v. Flood & Conklin*, 388 U.S. 395 (1967) did not apply under the Oklahoma Arbitration Act and that under Section 802 (A) of the Oklahoma Arbitration Act, which provides that arbitration clauses are valid, enforceable and irrevocable except upon such grounds as exist at law or in equity for the revocation of any contract, applies not only for arbitration agreements but also to contracts containing arbitration agreements. *Id.* at 917. Since the issue before the Court was whether the Oklahoma Arbitration Act would require mutuality of obligation not whether the Federal Arbitration Act requires mutuality of obligation, the majority opinion in no way conflicts with this Court's opinion in *Prima Paint*.

Since Oklahoma law governs the contractual relationship between Golf USA and the Petitioners, the majority did not err in finding that mutuality of obligation would not be required under Oklahoma law. Accordingly, the Petitioners' Petition for a Writ of Certiorari should be denied.

CONCLUSION

For each of the reasons set forth above, this Court should deny the Petitioners' Petition for a Writ of Certiorari.

Respectfully submitted,

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